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IN THE
Supreme Court of the United States

CURIOUS THEATRE COMPANY, *et al.*,
Petitioners,

v.

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF AMICUS CURIAE OF THEATRE COMMUNICATIONS GROUP IN SUPPORT OF PETITIONERS

BRUCE E.H. JOHNSON*
NOELLE H. KVASNOSKY
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101
(206) 757-8069
brucejohnson@dwt.com

STEVEN D. ZANSBERG
ADAM M. PLATT
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1888 Sherman Street
Suite 370
Denver, CO 80203
(303) 376-2409
SZansberg@lskslaw.com

Counsel for Amicus Curiae
*Counsel of Record

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....1

REASONS FOR GRANTING THE WRIT.....1

A. Theatrical smoking has been a part of free expression in America since the First Amendment's ratification in 1791.....3

B. States need this Court's guidance on whether theatrical smoking indoors is protected by the First Amendment. 8

1. Some states have informal policies to enforce indoor smoking bans against theaters only after complaints. 9

2. The inconsistent approach of states in enforcing their indoor smoking bans against theaters suggests awareness their smoking bans are inadequately tailored to accommodate First Amendment rights.....11

3. Indoor smoking bans with conditional exemptions for theatrical smoking have inadequate due process safeguards, which is invalid prior restraint of protected expression.....13

4. The Colorado Supreme Court failed to balance evidence of any legitimate state interests against First Amendment rights in theatrical smoking. 17

5. Without certainty as to the legality of indoor theatrical smoking, theaters may forgo producing certain plays because of license constraints.....18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 15

Forsyth County, Ga. v. The Nationalist Movement,
505 U.S. 123 (1992) 16

Franken Equities, L.L.C. v. City of Evanston,
967 F. Supp. 1233 (D. Wyo. 1997) 16

Inge v. Twentieth Century-Fox Film Corp.,
143 F. Supp. 294 (S.D.N.Y. 1956) 19

Keyishian v. Bd. of Regents,
385 U.S. 589 (1967) 16

NAACP v. Button,
371 U.S. 415 (1963). 16

Near v. Minnesota,
283 U.S. 697 (1931) 16

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 16

United States v. O'Brien,
391 U.S. 367 (1968) 20

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 2, 17, 18

STATE CASES

Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't,
220 P.3d 544 (Col. 2009) 1, 18, 20

STATE STATUTES

Ariz. Rev. Stat. § 36-601.01(B)(7) (2010) 14, 15

Cal. Lab. Code § 6404.5(d)(9) (2009) 14

Colo. Rev. Stat. §§ 25-14-201-209 (2009) 8, 12

Conn. Gen. Stat. § 19a-342 (2010) 8

D.C. Code § 7-1708(3) (2010) 14, 15

Del. Code Ann. tit. 16, §§ 2901–2907 (2010) 8, 14

Fla. Stat. §§ 386.201–2125 (2010) 9

Haw. Rev. Stat. §§ 328J-1–17 (2009) 9, 12

Idaho Code Ann. § 39-5503(1)(e) (2010) 14

410 Ill. Comp. Stat. 82/1–/75 (2010) 9

La. Rev. Stat. Ann. §§ 40:1300.251–263 (2010) 9

Mass. Gen. Laws ch. 270, § 22(c)(6) (2010) 14

Md. Code Ann., Health-Gen. §§ 24-501–511 (2010) ... 9

Me. Rev. Stat. Ann. tit. 22, § 1542(2)(B) (2009) . 14, 15

Minn. Stat. § 144.4167(9) (2009) 14, 15

Mont. Code Ann. §§ 50-40-101–104, 108, 110 (2009) 9

N.D. Cent. Code §§ 23-12-09–11 (2010) 9

N.H. Rev. Stat. Ann. §§ 155:64–77 (2010) ..... passim

N.J. Stat. Ann. §§ 26:3D-55–64 (2010) 9

N.M. Stat. § 24-16-12(N) (2009) 14

N.Y. Pub. Health Law § 1399-u (2010) 14

Ohio Rev. Code Ann. §§ 3794.01–09 (2010) 9

Or. Rev. Stat. §§ 433.835–860, 870–875 (2009) 9

35 Pa. Stat. Ann. §§ 637.1–11 (2009) 9

R.I. Gen. Laws § 23-20.10-6(b) (2010) 14, 15

Utah Code Ann. §§ 26-38-1–3, 7–9 (2009) 9

Vt. Stat. Ann. tit. 18, §§ 1741–1743, 1745–1746 (2010) 9

Wash. Rev. Code §§ 70.160.011–.030, .050–.100 (2010) 9

RULES

Sup. Ct. R. 37 1

OTHER AUTHORITIES

EDWARD ALBEE, WHO'S AFRAID OF VIRGINIA WOOLF? (Scribner, 2003) (1962) 6

GEORGES BIZET, CARMEN (Sonya Friedman trans., Random House 1996) (1875) 7, 8

NILO CRUZ, ANNA IN THE TROPICS (Dramatists Play Service Inc. 2003) 7

DAVID HERBERT DONALD, LINCOLN 593 (Touchstone 1995). 4

GEORGE FARQUHAR, THE BEAUX-STRATAGEM (H. Macaulay Fitzgibbon ed., London, J. M. Dent & Co. 1898) (1707) 3, 4

JOHN GAY, THE BEGGAR'S OPERA (B.W. Huebsch, Inc. 1920) (1728) 4

HAL HOLBROOK, MARK TWAIN TONIGHT! (IVES WASHBURN 1959) 7

ARTHUR HORNBLOW, HISTORY OF THE THEATRE IN AMERICA (J.B. Lippincott Co. 1919) 3, 4

Linda Hutcheon & Michael Hutcheon, *Smoking in Opera, in* SMOKE (Sander L. Gilman & Zhou Xun, eds., Reaction Books 2004) 8

John Drew in a New Play, N.Y. TIMES, Sept. 24, 1895 6

JAMES P. JORDAN & CHRISTOPHER SHORR, THE PAN SHOW (unpublished 2010) 13

Brendan Kiley, *First Amendment v. Smoking Ban*, THE STRANGER (Seattle, Wash.), Mar. 1, 2006 9

Jennifer Meyers, *Stage set for smoking ban*, LOWELL SUN (Lowell, Mass.), Oct. 7, 2009 14

JOHN OSBORNE, LOOK BACK IN ANGER (Penguin Books 1957) 6

Plays and Shows in June, N.Y. TIMES, June 12, 1892 6

Bruce Ramsey, Editorial, *Smoking ban hamstrings stage production*, SEATTLE TIMES, April 2, 2008 ..... 9, 10

Alex Ross, *Count Down (nuclear weapons)*, THE NEW YORKER, Oct. 3, 2005 8

WILLIAM SAROYAN, THE TIME OF YOUR LIFE (Harcourt, Brace & Co. 1939) 11

GEORGE BERNARD SHAW, MRS. WARREN'S PROFESSION: A PLAY IN FOUR ACTS (Archibald Constable & Co. Ltd 1907) 11, 12

TOM TAYLOR, OUR AMERICAN COUSIN (Toronto, Samuel French (printed but not published) 1869) (1858) 4, 5

The Theatrical Week, N.Y. TIMES, Jan. 15, 1893 ..... 5, 6

Anthony Tommasini, *Tweaking a Definitive Moment in History*, N. Y. TIMES, Dec 17, 2007 8

TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE (Dramatists Play Service Inc. 1947) 11

Richard Zoglin, *Break out the cigars*, TIME, Nov. 3, 2003 7

INTEREST OF AMICUS CURIAE[1]

Theatre Communications Group ("TCG") is a not-for-profit service organization with a mission of strengthening and promoting the professional not-for-profit American theater. TCG's membership comprises 476 theaters, including seven in Colorado,[2] and approximately 13,000 individual members. TCG awards grants to theaters and theater artists (approximately $1.3 million in the 2009 fiscal year), facilitates professional development opportunities for theater leaders, and advocates on behalf of American not-for-profit theater organizations, including filing amicus curiae briefs in support of its mission. TCG's members rely on actors' expressive conduct, including smoking, to convey meaning in tandem with a play's dialogue, movement, and other symbolic expression.

REASONS FOR GRANTING THE WRIT

In deciding this case, the Colorado Supreme Court found it "unnecessary" to determine if theatrical smoking is expressive conduct.[3] In doing

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[1] Counsel of record received timely notice of TCG's intent to file this amicus curiae brief under Supreme Court Rule 37 and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than TCG and its counsel made a monetary contribution to the preparation or submission of this brief.

[2] These include Arvada Center for the Arts & Humanities, Colorado Springs Fine Arts Center Theatre Company, Creede Repertory Theatre, petitioner Curious Theatre Company, Denver Center Theatre Company, OpenStage Theatre & Company, and Theatre Aspen.

[3] *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 548 (Col. 2009).

so, Colorado failed to consider that theatrical smoking has been a component of free expression in America since the framing of the Constitution. Any incidental negative second-hand effects of theatrical smoking—no evidence of which was presented by the respondents at trial—cannot outweigh the paramount importance of free expression. To determine the constitutionality of content-neutral regulations of expression, the evaluation of evidence from both sides balance First Amendment rights against competing public interests.[4] Colorado refused to undertake such a balancing analysis here.

Eighteen states have indoor smoking bans which prohibit theatrical smoking (or allow only conditional exemptions), but only Colorado's highest court has considered whether such a ban is constitutional under the First Amendment. Those remaining states interpret and enforce how their laws apply to theatrical smoking inconsistently (both individually and collectively), with the result that theaters, playwrights and actors are uncertain whether they may legally incorporate smoking in theatrical productions. TCG seeks to apprise this Court of how this uncertainty negatively impacts American theater and millions of theater patrons nationwide, and increasingly leads to theater artists self-censoring. Because playwrights, as copyright holders, have the right to insist on how their plays are licensed, a complete ban on any form of theatrical smoking will preclude theaters from

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[4] *See, i.e., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (balancing the government's interest in protecting citizens from unwanted noise against the First Amendment right to musical expression at an outdoor concert).

presenting a broad swath of America's theatrical oeuvre; or, if they may license the plays to be modified to remove smoking (which is by no means certain), the richness and nuance of expression that theatrical smoking adds will be lost. If theatrical smoking is banned or criminalized, given the dearth of acceptable alternative avenues of expression, theaters will be faced with a Hobson's choice: produce the play without the expressive smoking, or do not produce the play at all. This Court's opinion will resolve whether an outright ban on all theatrical smoking—even the smoking of non-tobacco alternatives—violates the First Amendment, as well as guiding states and cities without indoor smoking bans that may consider such legislation.

A. Theatrical smoking has been a part of free expression in America since the First Amendment's ratification in 1791.

Theatrical smoking has been omnipresent on the American stage from our nation's inception to the present day. At the time of the adoption of the First Amendment, theatrical smoking was already an integral part of plays produced on American stages. In George Farquhar's *Beaux-Stratagem*, performed in America by 1732 (and for many years thereafter),[5] the downtrodden character of Squire Sullen entreats his companion to smoke a pipe with him, and the derisive comment that Squire Sullen's son is a "man of pleasure" is corroborated because he smokes his

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[5] ARTHUR HORNBLOW, HISTORY OF THE THEATRE IN AMERICA 49 (J B. Lippincott Co. 1919).

pipe "eight-and-forty hours together."[6] Likewise, in John Gay's *The Beggar's Opera*, performed in New York by 1750,[7] the playwright directed male characters to sit at a table with tobacco and pipes, intended to portray an evening of leisure and decadence, with one character remarking "To-day shall be for Pleasure—To-morrow for Business."[8] Eighteenth-century playwrights drew on smoking to express a play's mood and tone and to display character's personalities, just as contemporary playwrights do today.

By 1868, when the Fourteenth Amendment was adopted, smoking remained deeply entrenched as expressive conduct in plays performed on American stages. Indeed, the play President Lincoln watched the night he was assassinated in 1865, *Our American Cousin*, used theatrical smoking as an integral plot component.[9] At one point, the character Asa recounts how his Grandfather asked him: "Will you excuse my lighting a cigar?"[10] The stage directions prompt Asa to strike a match.[11] Shortly thereafter, the audience realizes that Asa, in reenacting his Grandfather lighting his cigar, had himself burned his Grandfather's will, thwarting

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[6] GEORGE FARQUHAR, THE BEAUX-STRATAGEM 9, 100 (H Macaulay Fitzgibbon ed., London, J. M Dent & Co. 1898) (1707).

[7] *Hornblow*, *supra* note 5, at 61.

[8] JOHN GAY, THE BEGGAR'S OPERA 66-67 (B.W. Huebsch, Inc. 1920) (1728).

[9] DAVID HERBERT DONALD, LINCOLN 593 (Touchstone 1995).

[10] TOM TAYLOR, OUR AMERICAN COUSIN 34 (Toronto, Samuel French (printed but not published) 1869) (1858).

[11] *Id.*

receipt of a large inheritance.[12] This plot element cannot be convincingly portrayed without a lit cigar, which, if used in a contemporary production in a Colorado theater would be a criminal act under Colorado's Clean Indoor Air Act.

In later decades, theatrical smoking remained a much-employed way of expressing characters' personalities and to set a play's mood and tone. A *New York Times* article from 1893 notes the "importance of the use of tobacco on the stage":

> A glance at the New-York stage at any time in the season will show how prominent in the action of current plays the pipe, cigar, and cigarette are. At present the formidable cigar that Mr. Wilton chews with so much dramatic expression in the forcible third act of "Aristocracy" holds the foremost place in the admiration of playgoers, but Ms. E. J. Ratcliffe's saucy, and at first seemingly irrelevant, cigarette in the last act of "Americans Abroad" at the Lyceum has positive dramatic value; and so has Mr. Kelcey's well-mannered refusal to smoke a brother to it.
>
> Mr. Harry Davenport as the diffident physician in the "The New South" enjoys a very few pulls at a comfortable-looking pipe with a long cherry stem, and has some graphic and understandable "business" afterward in

[12] *Id.* at 34-35.

> fanning away the smoke pending the arrival of a pretty woman, that go further to show the importance of the use of tobacco on the stage."[13]

In *The Vandykes*, performed in New York in 1892, smoking was equated with villainy, where a character "incessantly smoking an ill-looking cigar . . . is seen to be a demoniac institution indeed, and one that cannot be too quickly sneered out of existence."[14] Smoking was also used to show the consequences of over indulgence: in *That Imprudent Young Couple*, staged in New York in 1895, the audience "laughed when Mr. Ferguson, who played the tempter's role, was made ill by the smoking of a long cigar."[15]

The tradition of employing theatrical smoking to express mood and tenor, as a plot device, and to typify a character's personality continues to the present day, in historical and contemporary works both well-known and as-yet obscure. In Edward Albee's *Who's Afraid of Virginia Woolf?*, smoking is an integral behavior of the character Martha, whose persistent nervous smoking conveys her neurosis to the audience.[16] John Osborne's classic *Look Back in Anger* evokes the 1950s, and the desperation of its characters, as layers of cigarette smoke filter through the main characters' cramped apartment.[17]

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[13] *The Theatrical Week*, N Y. TIMES, Jan. 15, 1893, at 13

[14] *Plays and Shows in June*, N.Y. TIMES, June 12, 1892, at 13

[15] *John Drew in a New Play*, N.Y TIMES, Sept. 24, 1895, at 5

[16] EDWARD ALBEE, WHO'S AFRAID OF VIRGINIA WOOLF? 50, 164 (Scribner 2003) (1962)

[17] JOHN OSBORNE, LOOK BACK IN ANGER (Penguin Books 1957).

Historical context can be lost without theatrical smoking. Hal Holbrook's one-man show *Mark Twain Tonight!* includes a cigar-puffing portrayal of Mark Twain, whose gruff, boisterous personality would be unrecognizable without a lit cigar in hand.[18] For the McCarter Theatre's production of the Pulitzer prize-winning play *Anna in the Tropics*, the ethos of the play's locale, a Tampa cigar factory in the late 1920s, came alive with the visual element that wreaths of cigar smoke imbue to a darkened stage.[19] Cigars are central to the characters' livelihood and culture, and a pivotal moment comes as the characters share celebratory puffs of the new cigar they created.[20] "Cigar smoke," a Time magazine review said, "is only one of the sweet and strange aromas that waft from Anna in the Tropics."[21]

Theatrical smoking takes center stage in opera, as well. Perhaps best known is the smoking in Georges Bizet's *Carmen*, which revolves around a gypsy girl who works in a tobacco factory in Seville.[22] In many productions, Carmen enters on stage with a

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[18] HAL HOLBROOK, MARK TWAIN TONIGHT! (Ives Washburn 1959)

[19] NILO CRUZ, ANNA IN THE TROPICS (Dramatists Play Service Inc 2003) The McCarter Theatre's production of *Anna in the Tropics* took place in 2003, prior to New Jersey's indoor smoking ban going into effect.

[20] *Id.* at 52-53.

[21] Richard Zoglin, *Break out the cigars*, TIME, Nov. 3, 2003, at 73.

[22] GEORGES BIZET, CARMEN (Sonya Friedman trans., Random House 1996) (1875).

cigarette in her mouth.[23] A chorus of smoking cigarette-factory girls fills Seville's town square, setting the scene.[24] In contemporary opera, John Adams's and Peter Sellars's *Dr. Atomic* conveys the unbearable tension and high anxiety surrounding the first testing of the atomic bomb with chain-smoking throughout, including having the singer portraying Dr. Oppenheimer wield an ever present cigarette.[25] One critic described how "Oppenheimer's chain-smoking is a leitmotif of the opera."[26] Each of these works, along with innumerable others in the canon of the American stage, would be markedly diminished without the expressive elements that actual smoking—including the exhaling or puffs of clouds or smoke—adds.

B. States need this Court's guidance on whether theatrical smoking indoors is protected by the First Amendment.

More than half the states and the District of Columbia have indoor smoking bans; eighteen of these states do not provide for an absolute exception for indoor theatrical smoking.[27] Without guidance on

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[23] Linda Hutcheon & Michael Hutcheon, *Smoking in Opera*, *in* SMOKE 231, 233 (Sander L Gilman & Zhou Xun, eds , Reaction Books 2004)

[24] Bizet, *supra* note 22, at 7 (*"The cigarette-factory girls appear, smoking cigarettes "*)

[25] *See* Anthony Tommasini, *Tweaking a Definitive Moment in History*, N. Y. TIMES, Dec. 17, 2007, at E1 ("Puffing away on cigarettes, his suit forever rumpled, full of bravado yet plagued with doubts, Mr. Finley's Oppenheimer is tragically flawed.")

[26] Alex Ross, *Count Down (nuclear weapons)*, THE NEW YORKER, Oct 3, 2005, at 60, 63

[27] Colo. Rev. Stat §§ 25-14-201–209 (2009), Conn. Gen Stat. § 19a-342 (2010), Del. Code Ann. tit. 16, §§ 2901–2907 (2010),

whether and how this pastiche of indoor smoking laws will be enforced, many theaters exercise—or forego—their First Amendment rights to expression through theatrical smoking in an atmosphere of uncertainty. A view from the field suggests that theaters react differently to the uncertainty of how states enforce indoor smoking bans, and that frequently this uncertainty leads theaters to self-censor.

1. **Some states have informal policies to enforce indoor smoking bans against theaters only after complaints.**

Oregon, Washington and Illinois appear to enforce the state smoking ban only after receiving complaints. Reportedly, Washington's smoking ban is not enforced against a theater unless a complaint is received.[28] Seattle Repertory Theatre used smoking in its production of Noel Coward's *Private Lives*, a play whose quick-witted elitist characters are rarely without a lit cigarette dangling from their hands, after the local prosecutor agreed to "let [the

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Fla Stat. §§ 386 201–2125 (2010); Haw. Rev Stat. §§ 328J-1–17 (2009), 410 Ill Comp. Stat 82/1–/75 (2010); La. Rev. Stat Ann. §§ 40 1300 251–263 (2010), Md Code Ann., Health-Gen §§ 24-501–511 (2010), Mont. Code Ann §§ 50-40-101–104, 108, 110 (2009); N H. Rev. Stat. Ann. §§ 155 64–77 (2010), N.J. Stat. Ann. §§ 26 3D-55–64 (2010); N.D Cent. Code §§ 23-12-09–11 (2010), Ohio Rev Code Ann. §§ 3794.01–09 (2010); Or. Rev Stat. §§ 433.835–860, 870–875 (2009), 35 Pa. Stat. Ann. §§ 637.1–11 (2009), Utah Code Ann §§ 26-38-1–3, 7–9 (2009), Vt. Stat. Ann tit. 18, §§ 1741–1743, 1745–1746 (2010), Wash. Rev. Code §§ 70.160 011– 030, .050–.100 (2010)

[28] Brendan Kiley, *First Amendment v. Smoking Ban*, THE STRANGER (Seattle, Wash.), Mar. 1, 2006, at 27

smoking] go".[29] Oregon's enforcing authorities relayed to Portland's Third Rail Theatre that enforcement of Oregon's smoking ban against theaters is complaint driven. Without assurances that it would not be fined, Third Rail resorted to self-censorship, entirely removing smoking from its production of Martin McDonagh's *A Skull in Connemara*. This eroded the effectiveness of the modified scene and the nature of the character who was to have smoked.

In Chicago, Illinois, it appears the Department of Public Health and the City of Chicago Public Health Department do not enforce the state and city smoking bans against theaters unless a complaint is made. Chicago's Steppenwolf Theatre has been warned twice under Chicago's ban for smoking in its theatrical productions, but has received no fines. In 2010, the Goodman Theatre received its first citation of Chicago's indoor smoking ban following a patron's complaint about smoking onstage in The Goodman Theatre's production of Brett C. Leonard's *The Long Red Road*. The Goodman Theatre had previously used smoking in productions since Illinois's and Chicago's smoking bans went into effect without censure. These informal policies are inadequate assurance that theaters can exercise their right to free expression without incurring sanctions or having the law capriciously and inconsistently applied against them.

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[29] Bruce Ramsey, Editorial, *Smoking ban hamstrings stage production*, SEATTLE TIMES, April 2, 2008, at B6

2. The inconsistent approach of states in enforcing their indoor smoking bans against theaters suggests awareness their smoking bans are inadequately tailored to accommodate First Amendment rights.

Many states inconsistently enforce their indoor smoking laws against theaters (if enforced at all), which suggests they realize these bans may violate the First Amendment. In New Jersey, both the McCarter Theatre and the Shakespeare Theatre of New Jersey have recently used smoking in productions and New Jersey's indoor smoking ban has not been enforced against them. Like the Seattle Repertory Theatre, the Shakespeare Theatre of New Jersey determined that the spirit of Noel Coward's *Private Lives* could not be conveyed without actual smoking, so it used herbal cigarettes in its 2008 production, along with ample signage alerting its audience that herbal cigarettes would be smoked. It also used smoking to convey the ethos and mood of a 1930s San Francisco bar in its production of William Saroyan's *The Time of Your Life*, and to portray the complex, despairing and conflicted character of Stanley Kowalski in Tennessee Williams's American classic *A Streetcar Named Desire*.[30]

The McCarter Theatre likewise used real smoking (of herbal cigarettes) in its production of George Bernard Shaw's *Mrs. Warren's Profession*. There, the character Vivie's smoking challenges

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[30] WILLIAM SAROYAN, THE TIME OF YOUR LIFE (Harcourt, Brace & Co. 1939); TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE (Dramatists Play Service Inc. 1947).

Victorian notions of gender roles and explores the sexual double standard, one of the play's themes. The stage directions regarding smoking are specific, and require Vivie, while engaged in dialogue, to "*nod . . . placidly with one eye on a wreath of smoke*," before "*blowing the wreath decisively away and sitting straight up.*"[31] The Pioneer Theatre Company in Salt Lake City, Utah, Stageworks Theatre Company in Tampa, Florida and the Cleveland Public Theatre in Cleveland, Ohio have all employed smoking in theatrical productions since their respective state instituted an indoor smoking ban, thus far without state reprimand.

Some theaters in states without exemptions for theatrical smoking have switched to using lighted cigarettes made of herbs, cloves, or lettuce, rather than tobacco. However, this alternative may fall outside the strict letter of indoor smoking laws that define smoking to include the carrying of lighted plant material[32] or any device designed to produce the effect of smoking.[33] Colorado alone defines "tobacco" to include "any other plant matter or product that is packaged for smoking."[34] Prior to its state's smoking ban, the Touchstone Theatre in Bethlehem, Pennsylvania used both tobacco and clove cigarettes in its productions. Now, with no guidance on how Pennsylvania's ban will be enforced, Touchstone is uncertain whether it will use smoking or a smoking alternative in its upcoming

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[31] GEORGE BERNARD SHAW, MRS WARREN'S PROFESSION: A PLAY IN FOUR ACTS (Archibald Constable & Co. Ltd 1907).

[32] *E.g.*, Haw Rev Stat. § 328J-1 (2009).

[33] *E g.*, N H. Rev Stat Ann. § 155:65 (2010).

[34] Colo. Rev. Stat. § 25-14-203 (2009).

production of *The Pan Show*, a bacchanal of drugs and rock n' roll whose mood requires a smoky haze.[35] The Know Theatre of Cincinnati, Ohio has used non-tobacco cigarettes in its plays, without Ohio's indoor smoking ban being enforced against it.

3. Indoor smoking bans with conditional exemptions for theatrical smoking have inadequate due process safeguards, which is invalid prior restraint of protected expression.

Some state indoor smoking bans allow narrow exceptions for theatrical smoking (or broader exceptions for smoking that a theater may apply for) or provide conditional exemptions for theatrical smoking. However, none of these laws specifies how these exemptions and exceptions are granted or denied, or provides any review or oversight of those processes. Additionally, the process to obtain an exemption can be time-consuming and complicated, with the result that an exemption is constructively impractical to obtain. For instance, the Merrimack Repertory Theatre in Lowell, MA is doubtful it will ever be issued an exemption again after political fallout from its use of theatrical smoking under Massachusetts's exemption. In response to the Merrimack Theatre's having used smoking in Eugene O'Neill's *Moon for the Misbegotten* under an exemption, the Lowell city council unanimously

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[35] JAMES P. JORDAN & CHRISTOPHER SHORR, THE PAN SHOW (unpublished 2010).

approved petitioning the city's Statehouse delegation to repeal the theatrical smoking exemption.[36]

The language of the laws in those states that ostensibly provide an absolute exception for theatrical smoking is vague, frequently requiring that smoking be "necessary" or "integral" to the theatrical production without further explanation of how that standard is met.[37] The language in the statutes of those states with conditional exemptions for theatrical smoking (or broader exemptions that might comprise theatrical smoking) is similarly vague.[38] This is in sharp contrast with those states that provide for absolute exceptions for theatrical smoking, which manage to accommodate First

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[36] Jennifer Meyers, *Stage set for smoking ban*, LOWELL SUN (Lowell, Mass.), Oct 7, 2009, at "News".

[37] *E.g.*, Cal Lab Code § 6404 5(d)(9) (2009) (ban does not apply "if smoking is an integral part of the story in the theatrical production"), Idaho Code Ann § 39-5503(1)(e) (2010) (ban does not apply to "[t]heatrical production sites, if smoking is an integral part of the story in the theatrical production"), N.M Stat § 24-16-12(N) (2009) (smoking is permitted on a "theatrical stage . . . when it is necessary for performers to smoke as part of the production")

[38] Del. Code Ann. tit. 16 § 2906(c) (2010) (waiver may issue if "there are compelling reasons to do so, and such waiver will not significantly affect the health and comfort of nonconsumers of tobacco products"), Mass. Gen. Laws ch 270, § 22(c)(6) (2010) (theatrical performer may smoke during a performance if permission first granted by appropriate local authorities); N.Y Pub Health Law § 1399-u (2010) (waiver may be granted if applicant establishes "(a) compliance . . . would cause undue financial hardship; or (b) other factors exist which would render compliance unreasonable.").

Amendment rights while achieving their regulatory goals.[39]

This Court has previously determined that states must provide adequate safeguards to ensure that protected expression is not incidentally censored in the regulation of other state interests.[40] This principle applies with special force to statutes that regulate activities that touch on First Amendment rights, as "freedoms of expression must be ringed about with adequate bulwarks."[41] Under the Fourteenth Amendment, a "[s]tate is not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutionally protected speech."[42] Additionally, where there is uncertainty surrounding how a potential criminal sanction will be enforced and applied—such as theaters in Colorado face with

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[39] Ariz. Rev. Stat. § 36-601.01(B)(7) (2010) (ban not applicable to a "theatrical performance upon a stage or in the course of a film or television production if the smoking is part of the performance or production"), D.C. Code § 7-1708(3) (2010) (does not prohibit smoking "[u]pon the stage by performers during the course of any theatrical performance if smoking is part of the theatrical production"); Me. Rev. Stat. Ann. tit. 22, § 1542(2)(B) (2009) ("Smoking is not prohibited in theaters . . . if the smoking is solely by a performer and the smoking is part of the performance."), Minn. Stat. § 144.4167(9) (2009) (smoking permitted "as part of a theatrical performance" as long as advance notice of smoking is given to theater patrons), R.I. Gen. Laws § 23-20.10-6(b) (2010) ("this chapter shall not apply to any stage performance provided that smoking is part of a theatrical production.")

[40] *E.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

[41] *Id.* at 66.

[42] *Id.* at 71 (finding Rhode Island's "informal censorship" was "radically deficient" in its process and unconstitutionally infringed protected expression).

Colorado's Clean Indoor Air Act—"the threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[43]

Government regulation constitutes prior restraint if it makes enjoyment of protected expression contingent upon government permission.[44] To avoid invalid prior restraint, states must not over-broadly delegate licensing discretion to a government authority.[45] Indeed, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[46] Courts have found unconstitutional prior restraint where government officials were granted "unfettered discretion" in granting or denying permits, similar to the facts here with regard to conditional exemptions for theatrical smoking.[47] Since those states with a conditional exemption for theatrical smoking do not provide *any*

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[43] *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (quoting *NAACP v. Button*, 371 U.S. 415 (1962))

[44] *Near v. Minnesota*, 283 U.S. 697, 713 (1931)

[45] *E.g., Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 130 (1992) (county ordinance allowing variable fee for parade permits was facially unconstitutional absent narrowly drawn, reasonable, and definite standards to guide fee determination), *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975) (striking down as unconstitutional prior restraint a permitting system for performance of theatrical productions and "condemn[ing] systems in which the exercise of such authority [is] not bounded by precise and clear standards"), *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233, 1237 (D. Wyo. 1997) (licensing scheme to operate indoor amusement and video establishment an invalid prior restraint where inadequate safeguards were in place for permit process).

[46] *NAACP v. Button*, 371 U.S. 415, 438 (1963)

[47] *Franken Equities*, 967 F. Supp. at 1237 (D. Wyo. 1997).

safeguards to protect expression through theatrical smoking—such as notice or hearing before denying an exemption—there is a viable risk of prior restraint impinging theater artists' First Amendment rights.

4. The Colorado Supreme Court failed to balance evidence of any legitimate state interests against First Amendment rights in theatrical smoking.

When determining the constitutionality of content-neutral regulations of expression, this Court assesses the evidence from both sides to balance First Amendment rights against competing interests.[48] Colorado refused to undertake any such balancing analysis here. The record in this case is devoid of any evidence that the incidental effects of second-hand smoke from theatrical smoking negatively impacts health, or indeed that there have been any complaints or concerns in Colorado about theatrical smoking at all.

In *Ward v. Rock Against Racism*, when weighing First Amendment rights in playing music against the state's interest in controlling noise pollution, this Court noted that New York City had in fact received numerous complaints about excessive noise at Rock Against Racism's concerts in Central Park from both users of Central park and residents

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[48] *See, i e., Ward v. Rock Against Racism*, 491 U.S 781 (1989) (balancing the government's interest in protecting citizens from unwanted noise against the First Amendment right to musical expression at an outdoor public concert).

of adjacent areas.[49] No such showing of any complaints has been made here, whether by theater patrons, health officials, or the general public. And, as Justice Hobbs noted, the State made no showing of any purported adverse health effects from second-hand non-tobacco smoke to justify the criminal ban on use of tobacco alternatives.[50] Colorado has stopped free expression in this instance without offering any evidence of complaints or problems with theatrical smoking. Unlike *Ward*, where after balancing the evidence on both sides this Court found that New York City's sound-amplification regulations were narrowly tailored to accommodate First Amendment interests in musical expression, here, the Colorado Supreme Court abridged petitioners' free expression without ever considering the weight of evidence on both sides. Rather than addressing the constitutionality of theatrical smoking with a sensitivity to the facts and circumstances surrounding such expression, as the New York City authorities did in *Ward*, Colorado has instead made a Procrustean bed, and Colorado's theaters are forced to sleep on it.

5. Without certainty as to the legality of indoor theatrical smoking, theaters may forgo producing certain plays because of license constraints.

Playwrights traditionally require their plays to be produced only as licensed, without unauthorized modifications such as removing or

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[49] *Id* at 785.

[50] *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 556 (Col 2009) (Hobbs, J., dissenting).

replacing smoking. Courts have found that "[a]ny limitation or conditions which the parties see fit to insert will be binding and may be enforced except where they are contrary to public policy or in violation of law."[51] As such, a playwright is unlikely to grant a license for a play in a state that does not allow theatrical smoking if he wants to insure his play is produced as he intended. In Chicago, Theatre Seven's production of *Killing Women*, a play infused with smoky atmospherics that are integral to the play's overall feel, was jeopardized when the playwright insisted the play not be produced without smoking, which was well within her rights as the play's copyright owner. Theatre Seven affirmed that in the future, without a right to theatrical smoking, there are countless plays it will not consider if it does not have the right to incorporate smoking. Other contemporary playwrights who have previously not allowed their plays to be produced without smoking include Luis Alfaro, Octavio Solis, and Richard Montoya.

Even if allowed under license, playwrights and theaters are hesitant to use smoking alternatives because they are inadequate substitutes. Some alternatives include electric cigarettes, electronic vapor cigarettes, or talcum powder cigarettes.[52] At times, audiences have reacted negatively to these

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[51] *Inge v. Twentieth Century-Fox Film Corp.*, 143 F Supp 294 (S.D.N Y. 1956) (citing *Buck v. Hillsgrove Country Club Inc.*, 17 F Supp 643 (D. R.I. 1937), *Manners v. Morosco*, 252 U.S. 317 (1920))

[52] These alternatives are not allowed in all states, as some states prohibit inhaling or exhaling from a "smoking device" *E g.*, N.H Rev. Stat Ann § 155 65 (2010).

substitutes, perceiving their use as parodic or humorous, rather than as developing the character, plot, or mood, as intended. Justice Hobbs noted in his dissent below that "[o]ne of the witnesses at trial testified that the audience had responded to a fake cigarette with laughter, though the author intended no comedy."[53] For example, a porcelain electronic misting cigarette will clink obviously when placed in an astray, making a noise a cigarette would not make. Additionally, TCG's members have cited the prohibitive cost of procuring tobacco-free or smoke-free alternatives as untenable given their limited prop budgets.

CONCLUSION

Because theatrical smoking has been a vital component of free expression for as long as the First Amendment has been in force, this Court should stringently examine whether Colorado's Clean Indoor Air Act is actually "narrowly drawn to further a substantial governmental interest."[54] Currently, the disparity among state indoor smoking laws leaves theaters, playwrights and theater artists unsure whether there will be criminal or civil consequences for incorporating theatrical smoking into their productions. By deciding this case, this Court will guide the states in properly weighing freedom of expression as they balance competing interests when legislating indoor smoking or interpreting existing legislation.

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[53] *Curious Theatre*, 220 P 3d at 559 (Hobbs, J., dissenting).
[54] *United States v. O'Brien*, 391 U.S 367 (1968).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE E.H. JOHNSON*
NOELLE H. KVASNOSKY
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue
Suite 2200
Seattle, WA 98101
(206) 622-3150
brucejohnson@dwt.com

STEVEN D. ZANSBERG
ADAM M. PLATT
Levine Sullivan Koch & Schulz, L.L.P.
1888 Sherman Street
Suite 370
Denver, Colorado 80203
(303) 376-2409
SZansberg@lskslaw.com

Counsel for Amicus Curiae

*Counsel of Record